

STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

Bruce M. Gooel

Petitioner

v

Office of Financial and Insurance Regulation
Respondent

Docket No. 2008-1015

Agency Case No. 08-706-L

Enforcement Case No. 08-5766

For the Petitioner:

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For the Respondent:

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Issued and entered
this 22nd day of May 2009
by Ken Ross
Commissioner

FINAL DECISION

BACKGROUND

This case concerns the application of Petitioner Bruce M. Gooel for a resident insurance producer license. Mr. Gooel filed his application with the Office of Financial and Insurance Regulation (OFIR) in February 2008. On the application, Mr. Gooel disclosed that in 2004 he had been convicted of a felony. The license application was denied for that reason. Mr. Gooel appealed the license denial and requested a hearing.

An Order Referring Complaint for Hearing and Order to Respond was issued on June 13, 2008. Mr. Gooel filed his answer on July 15, 2008.

On August 28, 2008, the OFIR staff, the Respondent in this case, filed a motion for summary decision pursuant to OFIR Hearing Rule 11 (1983 AACRS R 500.2111) asserting that the case has no genuine issue as to any material fact and that Respondent is, therefore, entitled to a decision in its favor as a matter of law. Petitioner filed a response to the motion on September 15, 2008.

On November 20, 2008, the administrative law judge ("ALJ") denied the motion. Respondent then filed a motion requesting that the ALJ reconsider her denial. Petitioner filed a response. The ALJ, on February 4, 2009, issued an order granting Respondent's motion for summary decision. Petitioner filed objections to that ruling. Respondent replied.

ANALYSIS

Having considered the arguments of the parties, the Commissioner finds that granting the summary decision motion of the OFIR staff is the correct resolution of this matter.

Hearing Rule 11 provides:

A party may move for a summary decision in the party's favor upon any 1 of the following grounds:

- (a) The commissioner lacks jurisdiction over the person or the subject matter.
- (b) The opposing party has failed to state a claim upon which relief can be granted.
- (c) There is no genuine issue as to any material fact and the moving party is therefore entitled to a decision in that party's favor as a matter of law.

It is appropriate that the matter be resolved by summary decision under Rule 11 because there are no genuine issues of material fact in this case. The following facts are not in dispute:

- In 2004, Petitioner was convicted in United States District Court, Eastern District of Michigan, of the felony Unlawful Storage of Hazardous Waste, 42 U.S.C. 6928(d)(2)(A) and 18 U.S.C. 2(a).
- Respondent applied for a Michigan insurance producer license in February 2008. He was denied the license because of his felony conviction.

The following provisions of the Michigan Insurance Code applied at the time Petitioner's application was reviewed:¹

Section 1205(1)(b), MCL 500.1205(1):

(1) A person applying for a resident insurance producer license shall file with the commissioner the uniform application required by the commissioner and shall declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the individual's knowledge and belief. An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following:

* * *

(b) Has not committed any act that is a ground for denial, suspension, or revocation under section 1239.

Section 1239(1)(f), MCL 500.1239(1)(f):

In addition to any other powers under this act, the commissioner may place on probation, suspend, revoke, or refuse to issue an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions for any 1 or more of the following causes:

* * *

(f) Having been convicted of a felony.

¹ These provisions were amended by Public Acts 422 and 423 of 2008, effective January 6, 2009. The amendments are discussed in more detail later in this Order.

By virtue of his felony conviction, Petitioner has “committed [an] act that is a ground for denial, suspension, or revocation under section 1239.” In such cases, section 1205 of the Code requires that the license not be approved.

In May 2004, this agency issued a final decision in the contested case *Mazur v Office of Financial and Insurance Services* (Case No. 03-384-L). *Mazur* was a licensing case similar to this case in that the applicant had been convicted of a felony before applying for a resident insurance producer license. *Mazur* held that no insurance producer license could be issued to an individual who had been convicted of a felony. The *Mazur* decision discussed the use of sections 1205 and 1239 of the Code in considering applications for resident insurance producer licenses:

Where statutes appear to conflict, a court or administrative agency is first supposed to look for a way to harmonize them. Here, the edict in Section 1205(1) allows for only one course for the Commissioner – disapproval of the application. Section 1239(1) allows the Commissioner discretion.

One attempt to bring harmony between the sections is to conclude that the Commissioner must exercise the discretion conferred by Section 1239(1) in light of all the standards in Chapter 12, including Section 1205(1). That is, the Commissioner chooses to be guided by the clear standard of Section 1205(1) in her exercise of discretion.

Where harmony cannot be found between two conflicting statutes, then other principles of statutory construction emerge. The more recent statute may prevail over the earlier statute. The more particular provision may prevail [over] the more general provision.

Section 1205(1) and 1239(1) both became effective March 1, 2002, so this is no basis for deciding which governs. However, Section 1205(1) is particularly concerned with establishing standards for licensure. Section 1239(1) deals with general standards of conduct and remedies. Thus, it is appropriate for the Commissioner to be guided in this decision by Section 1205(1).

In all the felony/producer licensing cases since *Mazur*, the Commissioner has ruled that section 1205 prohibits licensing an individual who has been convicted of a felony.

In his objections to the ALJ's opinion, Petitioner noted that, in January 2009, sections 1205 and 1239 of the Insurance Code were amended. Petitioner argues that the amendments demonstrate that the Commissioner, before the amendments, did have the discretion to issue licenses to individuals with felony convictions. Petitioner argues that the 2009 amendments removed from the Commissioner the discretion to license individuals with felony convictions. Petitioner argues that the Commissioner should not give deference to a previous ruling of the agency (the *Mazur* decision) because the 2009 amendments to the Code demonstrate that the decision was incorrect. Section 1205 (in both its original and amended forms) does not employ discretionary language. Rather, it employs the mandatory language that a license "shall not be approved" in the presence of one of the grounds stated in section 1239.

Petitioner also argues that, by denying him a license, OFIR had applied the 2009 statutory changes retroactively, and that such application of a statute was not intended by the legislature. The present decision, however, does not rely on giving retroactive effect to newly enacted statutes. The agency's policy with regard to licensing individuals with felony convictions was established years before the 2009 amendments. The present decision is one of a long series of decisions denying producer licenses to individuals with felony convictions. Both the agency's pre-2009 policy and the 2009 statutory amendments are consistent – a felony conviction disqualifies an individual from receiving a producer license. It is a logical fallacy to argue, as Petitioner does, that the new statutes' language, by explicitly stating the disqualification, means that any prior statute must have granted the Commissioner the discretion to license the individual.

Ironically, Petitioner's argument itself endorses a kind of retroactivity. In effect, he argues that the meaning of the older law is dependent on the language of the more recent law. In fact, the new language only restates what was already clear – that in licensing insurance producers, a felony conviction is a disqualifying condition.

Petitioner argues that “[t]he Mazur interpretation of the statutes rendered the discretion granted to the Commissioner in Section 1239 nugatory.” (Objections, page 11) Section 1239 describes a number of actions the Commissioner may employ to sanction conduct that is inconsistent with the standards of the Insurance Code. A licensee who violates a provision of the Insurance Code may be fined or have the license suspended or revoked. However, when an unlicensed individual applies for an insurance producer license and is found to have engaged in conduct described in section 1239 (e.g., being convicted of a felony), under section 1205 of the Code the Commissioner must decline to issue a license. In other words, sections 1205 and 1239 grant a range of powers for the Commissioner to employ when dealing with wrongful conduct by persons already licensed. But where an individual not already licensed engages in that conduct, the Commissioner is without discretion and must deny the license. This approach to licensing questions gives effect to both section 1239, which concerns the Commissioner's broad enforcement authority, and section 1205, which is concerned with the more specific authority in resolving licensing questions.

Finally, Petitioner argues that *Mazur* and the agency's subsequent license cases constitute the improper promulgation of an administrative rule. The Commissioner finds this argument

without merit. Agency principles may be established through the adjudication of contested cases.

As stated in *Detroit Auto Inter-Insurance Exchange v Commissioner*, 119 Mich App 113, 117-8 (1982), while an agency does have the power to promulgate administrative rules,

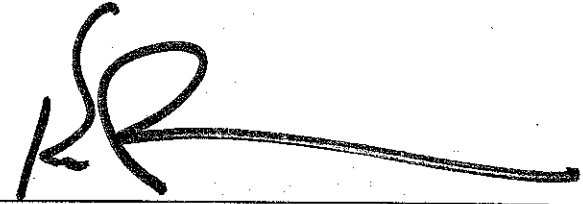
an administrative agency need not always promulgate rules to cover every conceivable situation before enforcing a statute. Specifically, an administrative agency may announce new principles through adjudicative proceedings in addition to rule-making proceedings. The United States Supreme Court stated in *Securities and Exchange Comm. v. Chenery Corp.*, 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947):

“Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.”

The *Mazur* case was an appropriate vehicle to state agency policy with respect to the licensing of individuals with felony convictions. It is also important to observe that *Mazur* did nothing more than restate what already existed in the licensing statute itself. Section 1205 prohibited issuing insurance producer licenses to individuals who had committed an act that was grounds for denial, suspension, or revocation under section 1239. Under these statutory provisions, Petitioner is not qualified to receive an insurance producer license. It is appropriate to grant Respondent's motion for summary decision.

ORDER

Therefore, it is ORDERED that the Petitioner's application for an insurance producer license is denied.

A handwritten signature in black ink, consisting of a stylized 'K' and 'R' followed by a long horizontal line.

Ken Ross
Commissioner